



UUMILC 2017
9TH UUM INTERNATIONAL LEGAL CONFERENCE

**THE THEORIES UNDERPINNING PERSONAL INSOLVENCY OR
BANKRUPTCY LAW: A LEGAL OVERVIEW**

Ruzita Azmi (a)*, Adilah Abd Razak (b), Siti Nur Samawati Ahmad(c)

*Corresponding author

(a) School of Law, Universiti Utara Malaysia/Universiti Utara Malaysia Kuala Lumpur, zita@uum.edu.my

(b) Department of Marketing and Management, Universiti Putra Malaysia, adilah@upm.edu.my

(c) Kolej Profesional MARA Beranang, Selangor, samawati.ahmad@mara.gov.my

Abstract

In Commonwealth countries including Malaysia, when individuals become bankrupt the legal mechanism is the bankruptcy law. Both law and policy on bankruptcy have been subject to long-standing debate. The goal of bankruptcy law, at its core, is effective debt collection. Another important feature of bankruptcy law is for individual debtors who resort to bankruptcy to obtain a discharge as a form of bankruptcy relief or rehabilitation. Discharge is viewed as granting the debtor a financial fresh start. Historically, these two features: to serve as a collective debt-collection device and to protect the interest of the debtors in providing for their discharge, have entered bankruptcy laws at different stages in its development. Whether bankruptcy should concern itself in catering for the creditors' maximization of return to recover their debts, or to protect the interest of the debtors in providing for their discharge, or to protect the public from culpable bankrupts, resulted in debates on the underlying principles such as the objectives and theoretical foundations of such law. To properly understand the role of such law, it is pertinent to review the theories underpinning bankruptcy law. For this purpose, information was obtained by scrutinizing various secondary data comprising of textbooks, articles from both law and other social science journals.

© 2018 Published by Future Academy www.FutureAcademy.org.UK

Keywords: Discharged bankrupts, culpable bankrupts, bankruptcy theory, objectives of bankruptcy.



This is an Open Access article distributed under the terms of the Creative Commons Attribution-Noncommercial 4.0 Unported License, permitting all non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

1. Introduction

According to Rajak (2008), among the important features essential to bankruptcy law, are first, as a collective process, subjecting all the creditors' claims against that debtor to a single regime under which the debtors' assets are partially or totally removed from the debtor's control. Secondly, that the debtor should be discharged from all debts and be restored as a full financial citizen. Origins of bankruptcy law can be traced back to the days of Roman law. Even its terminology is derived from the Roman phrase "*banco rotto*," coined after a medieval custom in an Italian city of breaking the bench in the market place of a banker or tradesman who absconded with the property of his creditors and no longer able to meet his debts (Rajak, 2008; Jackson, 2001). Historically, as also pointed out by Rajak (2008), "there is some evidence of this collective regime in early Greek and Slavic law, as well as in the Law Merchant which may have influenced its introduction into England in medieval times." Comparatively, the bankruptcy law for individuals in England has its roots in the earlier days of common law when there was neither a formal system for any collective form of execution and sharing of expenses among the creditors, nor the means to find out about the status of the debtor's assets, which then resulted in the rule of 'first come, first served' (Cork Report 1986: para 31). The enactment of the first English Bankruptcy Act of 1542 conferred upon any aggrieved party the right to procure seizure and sale of the debtor's property and distribute it among the creditors in proportion to the quantity of their debts (Fletcher 2002). Such statute therefore recognized the main features of the foundations of bankruptcy law, namely, collectivity participation by the creditors, and *pari passu* distribution of the debtor's available assets among the creditors. The law remained "very much creditor-oriented" (Cork Report 1986: para 31). It was not until the eighteenth century that the idea of rehabilitation was acknowledged by the Statute of 4 Anne (England and Wales) in 1705, where the law introduced the relief of bankrupts through the concept of discharge from liability of existing debts for those who co-operate with their creditors (Goode, 2008). Yet, Rajak (2008), argued that it was not until later during the modern times that one could find what would now be considered an essential aspect of bankruptcy regime, namely, the discharge of the debtor. It can be seen that these essential characteristics of bankruptcy law; to serve as a collective debt-collection device and to protect the interest of the debtors in providing for their discharge have become part of bankruptcy laws at different stages in its development. Whether bankruptcy law should concern itself to cater for the creditors' maximization of return to recover their debts or to offer the prospect of rehabilitation to the debtor, led to debates or discussion on the underlying principles such as the objectives and theoretical foundations of such law. The discussion starts with problem statements and research questions of the study. Then the purpose and research methods employ in this study are explained prior to the discussion on findings and conclusion.

2. Problem Statement

When people borrow, things may not work out as hoped, for a variety of reasons: bad luck or business misfortune, the unexpected loss of a job, natural disaster, economic downturn, dishonesty and the list continues, which make it inevitable for their inability to repay what they owe. Bankruptcy is legally defined as a debtor's inability to meet all debts in full as they fall due, and it is intimately linked to indebtedness (Pheng & Detta, 2014; Rajak, 2008). If a debtor is a business debtor, bankruptcy may affect

many parties that have interests in the continuance existence of the debtor's businesses. Such wide repercussion can be seen in the loss, which the creditors and other stakeholders suffer as the consequence of a debtor or businessman becoming a bankrupt. The bankrupt's employees may also suffer because they may be left unemployed and the government too will lose out on taxes. Bankruptcy takes an enormous physical and emotional toll on individuals and relationships alike. Long-time business partnerships, friendship and marriages sometimes stumble under the constant pressure to survive financial hardship (Baylor Business Review, 2007). Regardless of whether the individual debtor is a business or consumer debtor, there are valid concerns regarding the social impact of over-indebtedness on families and communities (McKenzie-Skene & Walters, 2008). Accordingly, it is significant to examine the objectives and underpinning theories of bankruptcy laws.

3. Research Questions

When an individual debtor becomes bankrupt, questions are asked regarding the action to be taken and the purpose of the action. Questions include these: Should bankruptcy law be mainly used to maximize returns to the creditors? Should the law be more concerned to discharge the debtor from past financial obligations so that the debtor could gain a fresh start financially? Should the law be equally concerned to protect others interest like the public or community from culpable bankrupts? To answer these questions, it is necessary to deal with the appropriate role and scope of bankruptcy law and addressing the theoretical foundations of the bankruptcy law.

4. Purpose of the Study

Whether bankruptcy should concern itself to cater for the creditors' maximization of return to recover their debts or to protect the interest of those affected with the debtors go into bankruptcy or to offer the prospect of rehabilitation to the debtor has pointed to the debates or discussion on the underlying principles such as the objectives and theoretical foundations of such law. Accordingly, this study aims to examine the goal or objective and theories underpinning bankruptcy law.

5. Research Methods

In order to examine the role and underpinning theories of bankruptcy law, the research data for this study are obtained through secondary data analysis (McConville & Wing, 2007). The secondary data are derived from textbooks, reports and articles from law journals and reviews as well as other social sciences journal.

6. Findings

Initial findings disclose that to appreciate the objectives of the bankruptcy law, the competing underpinning theories of the bankruptcy law need to be examined first. Theories like Creditors' Bargain Theory (CBT), Bankruptcy Theory Policy (BTC), Risk Sharing Theory (RST) and Procedure Theory (PT) view the role of bankruptcy law to be merely concerned with maximising returns to creditors in forms of collection mechanism. Indeed those theories look upon the role of bankruptcy law as evolving around the issue of creditors, including matters such as the protection of their interests or the distribution of the

bankrupts' assets among them. Meanwhile the Value Based Theory (VBT) Debtors Cooperation Theory (DCT), The Economic Theory of Discharge (ETD), Impulse Control and Incomplete Heuristics Theory (IC&IHT) and Social Utility Theory (SUT) take a wider approach than creditors' maximization theories. They recognize that bankruptcy law has some other distributional role, for instance, to protect the interest of the debtors in providing for their discharge; to protect public or community interest affected by individuals' bankruptcy as well as to protect the public from culpable bankrupts.

Theoretical discussions on the foundations of bankruptcy could also be found in the legislation on bankruptcy law in the Commonwealth jurisdictions. In England and Wales (E&W) for instance, where from the first 1542 Act applicable to E&W to the Enterprise Act 2002 (EA 2002) while for Malaysia it began from the Bankruptcy Act 1967 (Act 360) to the new Bankruptcy (Amendment) Bill 2016. Up till this paper is written, the Bankruptcy (Amendment) Bill 2016 (Bill) has been passed. Although this Bill has recently passed it has yet to come into force upon official announcement by the Malaysian authorities.

By carefully scrutinizing these statutory provisions, several important elements or features of bankruptcy laws can be discerned. First, the interest of the creditors in maximizing their return in recovering their debt. Secondly, the interest of the debtors in providing for their discharge. Thirdly, the public interest in protecting the public from culpable and irresponsible debtors.

6.1.Theories on the Appropriate Role of Bankruptcy Law

Theories which propagate bankruptcy law's main goal to act as a collective mechanism and to maximize creditors such as the Creditors' Bargain Theory (CBT), Bankruptcy Theory Policy (BTC), Risk Sharing Theory (RST) and Procedure Theory (PT) will be discussed in the next section. This is followed by the theories that promote bankruptcy law's role as not merely to take on board the creditors' interest, but should also aim to offer discharge, as a form of bankruptcy relief or rehabilitation to the individuals bankrupt. Among these theories are Value Based Theory (VBT) Debtors Cooperation Theory (DCT), The Economic Theory of Discharge (ETD), Impulse Control and Incomplete Heuristics Theory (IC&IHT) and Social Utility Theory (SUT).

6.1.1. Creditors' Bargain Theory (CBT)

Based on this theory, the main role and objective of bankruptcy law is to maximize the collective return to creditors through a compulsory collective system and to solve the 'common pool' of assets problem, arising from diverse claims to limited assets (Baird & Jackson, 1984; Ayotte & Skeel, 2013). Accordingly, bankruptcy law should play its role as a debt-collection device whereby the creditors agree to a collective procedure to enforce their claims rather than following a procedure of individual action. By doing so, the conversion costs of transferring a bankrupt debtor's assets to its creditors can be kept to the minimum (Baird & Jackson, 1984; Jackson, 2001; Brunstad Jr, 2014). It is argued that CBT is an application of the famous Rawlsian notion of bargaining from behind a 'veil of ignorance' (Jackson, 2001). Here, the CBT reflects the kind of agreement to which creditors would agree if allowed to do so before they had lent, or extended credit to individual debtor. In the CBT, the bargain is hypothetical, but the creditors have the attributes that creditors in the real world transaction possess, as it is claimed that 'the hypothetical bargain analysis provides indirect evidence of what real world parties would, in fact,

agree to' (Jackson & Scott, 1989). The theory assumes that the *ex-ante* creditors' bargain would agree to renounce their claims independently if the debtor is bankrupt and substitute them with a collective debt enforcement regime instead. Such a collective system would eliminate the practice of 'first in time, first in priority' which is considered a 'race to collect' between creditors. The collective system would increase creditors' returns for a number of reasons: first, the debtors' assets seized by the creditors are more valuable if sold together as a going concern than if they were disposed of piecemeal by individual claims. Secondly, compared to the individual claims the creditors would no longer need to waste resources monitoring the debtors' financial estate, which would allow them to expect a more certain return on their loans (Mokal, 2001). More importantly, this theory of bankruptcy law is focusing to maximize net asset distributions to the creditors as a group, and not only merely act as an assets' distributional mechanism (Scott, 1986).

6.1.2. Bankruptcy Theory Policy (BTC)

Similarly to CBT, BTC too views bankruptcy law to be a debt collection scheme or law for distributing the wealth among the creditors due to the failure of a debtor's business. The goals of the bankruptcy law among others is to act as a collection system to fairly distribute the debtor's asset. In addition, bankruptcy law also act to force creditors who deal with the debtor to bear the burden of their losses from the contract they entered with the debtors (Yongqing, 2011).

6.1.3. Risk Sharing Theory (RST).

The RST suggests that bankruptcy law's aim is to maximize the debtor's overall value of assets and to force the creditors to share with the debtor the risks of a debtor business failure. Accordingly, under the risk-sharing agreement, the creditors that deal with the debtor would have agreed to deal with the risk of a debtor becoming bankrupt (Yongqing, 2011).

6.1.4. Procedure Theory (PT)

The core of this theory is that bankruptcy law exists in order to maximize the recoveries of, and benefits for those who have legal entitlements ("rights holders") in respect of a financially distressed debtor. Therefore, PT recognized bankruptcy law as a mechanism to enforce the right of the 'right holders' against the debtors, without abusing the interest of the debtors in maximizing the recoveries and benefits to the former. It was submitted by Mooney (2004), that it is wrong to distribute the assets of a debtor away from its right holders to benefit of a non-right holders or third-party interests such as at-will employees and the general community.

6.1.5. Value Based Theory (VBT)

Unlike the theories mentioned above which offer a single economic rationale, the VBT approaches do not just consider bankruptcy law to act as a mechanism for debt collection but more importantly to act as a medium to deal with all potential problems arising from the financial distress, not only economically but also moral, political, personal and social aspects. Other than just addressing the problems of financial distress faced by a debtor, VBT advocates to promote a debtor's bankruptcy discharge in order to give a

fresh start to a debtor (Korobkin, 1993). In addition it emphasises that bankruptcy law should contribute to the fresh start of a debtor by rehabilitating a debtor into a good financial state in which they can create good meaningful values in their life (Yongqing, 2011).

6.1.6. Debtors Cooperation Theory (DTC)

According to debtor's cooperation theory, bankruptcy discharge is a way to reward the debtors who give full cooperation with their creditors during collection process (Hynes, 2004). Discharge, is considered to be "a carrot dangled in front of debtors" to ensure that they will give cooperation in managing their assets in the bankruptcy case (Sousa, 2010). Indirectly, such theory believes that discharge will increase creditors' dividends and reduced administrative costs (King, 2004). According to this theory the notion of discharge seems to maximize the collection that the creditors can possess from the assets of the debtors. It is believed that discharge can somehow encourage the debtors to be honest to pay their debts; prevent the debtors from hiding their properties, which should be disposed to pay their debts to the creditors (King, 2004). In order to obtain discharge, debtors must cooperate with their creditors in their assets distribution and debts repayment. If they refuse to cooperate with their creditors, their discharge will be delayed or denied (King, 2004).

6.1.7. Economic Theory of Discharge (ETD)

The founders of theory on ETD are Professors Margaret Howard and John M. Czarnetzky. This theory emphasizes that the discharge is important for the debtors in order to restore their participation in open credit economy. Indeed this view is significant in order to motivate a debtor to market back himself and to become more productive although in some situation the income generated from working primarily benefits existing creditors (Sousa, 2010). This vision is in line with the purpose of the fresh start law itself, which will free the debtor from a financial hardship in which he has the right to earn, spend, borrow and repay the money in a more manageable way (Porter & Thorne 2006; Fossen, 2011).

According to the entrepreneurial hypothesis made by Professor Czarnetzky, (2000), it is vital to have the bankruptcy discharge in order to foster entrepreneurship in the market. It has been said that "*the bankruptcy discharge allows the honest individual engaged in business to be freed from the constraints of impossible debt when unexpected and unavoidable business misfortune occurs*", (Sousa 2010: p.590; Czarnetzky, 2000). Further, it is claimed that discharge can act as a safeguard to entrepreneurs with an incentive to start new business ventures upon failure (Czarnetzky, 2000). Consequently, the discharge granted will not only benefit a debtor but the society as well. Discharge is also justifiable to be given to the debtor where both a debtor and creditor cannot foresee the failure of a debtor's business. In such circumstances the creditor should bear the risk since the creditor is in a better position to prevent failure or to secure him with security from the debtors (Czarnetzky, 2000). However, it was submitted by Czarnetzky, (2000) that this theory is more applicable for business bankrupts since the consumer bankrupts are rarely like to engage in entrepreneurial activity than business bankrupts.

6.1.8. Impulse Control and Incomplete Heuristics Theory (IT and IHT)

This theory is divided into two notions. First, under the notion of impulse control, it is argued that many individuals can be likened to ‘animals’ whereby they simply cannot control their ‘impulse or desire’ to consume or borrow on credits and thus incur too much debt (King, 2004). Therefore bankruptcy discharge is seen to serve as a control mechanism for people who possess such kind of attitude or behaviour in accruing debt (Sousa, 2010).

Secondly, under the notion of incomplete heuristics, an individual customer is regarded as a person who, when making credit decisions, systematically underestimate future risks and overestimate future success and that is why the bankruptcy discharge is needed for freeing individuals from the adverse effects of incomplete heuristics. However, it is submitted that this theory fail to define which consumptions are considered to be irrational or not which cause people to incur more debts. As pointed out by Sousa (2010) *“That is, are these irrational individuals buying unnecessary wide-screen televisions, or are they incurring credit-card debt to pay for groceries or medical bills?”* Further, this theory seems to be acceptable if the incurrence of debt is not necessary for everyday survival (Sousa, 2010).

6.1.9. Humanitarian Theory of Consumer Discharge (HTCD)

HTCD focuses on the rehabilitation towards the debtor and how such rehabilitation given can benefit the community. It was submitted by King, (2004) that it is a duty of the society to rehabilitate the debtor and one of the measures is by giving discharge. Although the benefit of discharge to the community is something which cannot be measured., it was submitted by King (2004), that discharge may stabilise families, allows the quest for greater prosperity and ensures better physical and emotional health. Along the similar vein, discharge will allow a debtor an opportunity to earn a living. By giving a discharge, it can give a debtor to gain his self-determination to continue his life rationally without financial distress that can benefit himself as well as the community as a whole (Flint, 1991). However, it is argued that the relation between the discharge period and debtor’s physical and emotional health is still conflicting and unclear since it has been contended by some financial counsellors that the period of bankruptcy does not have a significant impact on the lives of bankrupts with no assets and low incomes (King, 2004). Accordingly, discharge should be granted as life being an undischarged bankrupt is both psychologically and emotionally damaging (King, 2004). Furthermore, discharge can somehow give forgiveness of indebtedness (Fabian, 2013). It gives a debtor the opportunity to regain self-esteem and once again become a productive member of society.” Forgiveness for indebtedness is appropriate if four preconditions are met: (i) “there must be a wrong committed i.e. by a debtor when he failed to pay the debts”; (ii) “the wrong must harm another i.e. the creditors which have not been paid for goods or services given”; (iii) “the creditor resent the failure of a debtor to pay his debts; and (iv) “the debtor filing for bankruptcy protection acknowledge publicly his or her failure to pay debts” (King, 2004). In relation to the forgiveness of indebtedness, a question arises on the consent from the creditor to give forgiveness, among others: “Is it mandatory to obtain consent from the creditors in awarding discharge to a debtor?” (Sousa, 2010). However, despite promoting discharge and forgiveness to a debtor, it is still subject to an exemption. In a case where a debtor committing a wrong during a bankruptcy processes, the right may be denied. For example illegal destruction or concealment of property that can affect the right of a creditor.

If that happens a debtor has to bear the responsibility for his own misconduct and may be subject to discharge denial (Flint, 1991).

6.1.10. Social Utility Theory (SUT)

SUT supports a short discharge period since the lengthier a debtor remain in the bankrupt status it will weaken the fabric of society, since a debtor may lose incentive to produce income, preferring to rely on community welfare programs instead (King, 2004). By obtaining a quick discharge it will motivate a debtor to start his or her new life again without relying on public support (King, 2004). A short discharge period not only supports the debtor but also for cost savings in the administration of bankruptcy cases (King, 2004). Furthermore, discharge is justified for the purpose of economic rehabilitation for the debtor to become more productive in creating income (King, 2004). If they remain in debt most of his or her earnings go to creditors and this will discourage the bankrupt to use their full employment capacity to acquire income or property (King, 2004).

6.2. Review of the Bankruptcy Law Theories in England and Wales (E&W) and Malaysia

It is pertinent to mention that the competing theories put forward by scholars are indispensable to bankruptcy law; the CBT, BTC, RST and PT promote the creditors' maximization through concept of collectivism and the VBT, DTC, ETD, IT&IHT, HTCD as well as SUT advocate the notion of discharge. Historically, these two features of bankruptcy law: to serve as a collective debt-collection device and to protect the interest of the debtors in providing for their discharge have entered bankruptcy laws at different stages in its development. In England the state of law was unsympathetic towards individual insolvency (bankruptcy) from the early years until the 18th century. The law was rather concerned in providing a punitive rather than a rehabilitative solution towards the debtors and the primary objective of the law was mainly to cater for the creditors' maximization of return to recover their debts. The principles of collective participation of creditors to collect their debt and *pari passu* distribution of the debtor's available assets among the creditors could be found as early as the first 1542 Act. Eventually, the harshness of the sentence was lessened when an insolvent debtor could be relieved of the burden of his accumulated debts which he had no prospect of repaying, thus offering the prospect of rehabilitation to the debtor. Slowly, but surely, the bankruptcy law gradually evolved from being generally uncompromising to a more generous attitude towards insolvent debtors. This can be seen when the concept of discharge was introduced for the first time to provide relief to debtors from harassment, and rehabilitation became available to debtors who cooperate with the process via the Statute of 4 Anne in 1705 in England.

Several Acts were later replaced by a series of bankruptcy statutes that laid the foundations of the modern law of bankruptcy and in the E&W bankruptcy is governed by Part IX of the Insolvency Act 1986 (IA 1986) and Insolvency Rules 1986. The significant pivotal Act was the EA 2002, which radically transformed English bankruptcy laws in E&W. EA 2002 introduces amendments to the bankruptcy law that incorporate the most up to date bankruptcy regime. The rationale underlying the EA 2002 reforms are to reduce stigma of bankruptcy for business debtors, to promote entrepreneurship, to give a new start to those who have failed through no fault of their own, and to provide real protection against the small

percentage of bankrupts who exploit their creditors and the public (White Paper on Productivity and Enterprise Insolvency- A Second Chance: 2001). The EA 2002 divides business debtors into two: the blameless and the blameworthy. For the blameless debtor, he is entitled to automatic discharge after twelve months (a reduction from the previous period of three years) with no restriction and this will help him to revive his business. For the blameworthy who has a Business Restriction Order (BRO) made against him, after getting the automatic discharge within twelve months, he will be released from liability but not from the BRO, which can range from two to fifteen years. BRO is a court order made against a bankrupt once a court has decided that the bankrupt's conduct has been culpable or dishonest. An example of court order is that the bankrupts must inform potential business colleagues and associates the name, or trading style under which they were made bankrupt. Thus, discharge from liability for debts and discharge from the restriction of BRO are considered as separate matters (White Paper on Productivity and Enterprise Insolvency-A Second Chance: 2001)

In England and Wales, under section 279 of IA 1986, a bankrupt will be discharged one year from the making of the bankruptcy order where that order is made on, or after 1 April 2004, subject to application made by Official Receiver (OR) or estate of the bankrupt under section 279(3) and offences committed by the bankrupt. As previously noted, the period to be discharged was 3 years and has been reduced to 1 year by the EA 2002. Despite discharge has been seen to be a practical way in delivering the fresh start policy as well as to give a second chance to the bankrupt, it must be balanced with public protection (Walters 2004). The BRO is introduced for public protection in a response to misconduct by a bankrupt in connection with the bankruptcy, whether prior or subsequent to the bankruptcy order (West 2012). Also, it was pointed out that BRO is introduced to place extended restrictions on the culpable bankrupts as well as to allow lenders and the public to differentiate between culpable and non-culpable bankrupts and makes better-informed decisions in their dealing with them (Moser 2013).

According to Sousa (2010), the Debtor Cooperation Theory (DCT) was the primary justification for offering the earliest discharge in England (and in the American Bankruptcy Act of 1800). Indeed, historically as pointed out earlier, Levinthal, (1919) in his writing said the earliest discharge given to a debtor who is honest insolvent and gives cooperation towards management of their bankruptcy debts which was enforced in England under The Statute of 4 Anne Chap 17 (1705) and 10 Anne Chap. 15 (1711). Hynes (2004), argues it is important to obtain debtor's cooperation in collecting debt's process since there will be a case where a debtor could easily hide significant assets from their creditors. Meanwhile the ETD allows an honest individual engaged in business to be freed from the constraints of impossible debt when unexpected and unavoidable business misfortune occurs, conforms with the concept of automatic discharge. As noted, the bankruptcy law in E&W via EA 2002 which had reduced its general discharge period from three years to one year in order to encourage entrepreneurship and responsible risk taking.

According to Sousa (2010) the vision of Social Utility Theory (SUT) can be seen in the case of *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934). The Court stated that:

"One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." This purpose of the act has been again and again

emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”

For Malaysia, the numerous stages of its history under English administration and post-independence from British Government have shaped the structure of its personal insolvency or bankruptcy law. Being a commonwealth country, Malaysia has inherited many English and common law principles, and such principles are replicated in the Malaysian bankruptcy laws. Malaysian bankruptcy law does promote for creditors maximization as well as caters for bankruptcy discharge. While the principles of collective participation of creditors to collect their debt and *pari passu* distribution of the debtor's available assets among the creditors can be seen in the case of *Agroco Plantation Sdn Bhd v Besharapan Sdn Bhd* [1999] 6 MLJ 80, Richard Malanjum J opined that the objective of the bankruptcy process is that, since the debtor is unable to satisfy all his debts, his assets should be shared fairly and equitably among his creditors. It has been submitted by Asia Banker Research that Malaysian bankruptcy law is the fourth most creditors' friendly bankruptcy regime where the creditors can recover more than 80 percent in the dollar of assets they are owed, and the recovery process takes on the average of two years (Radakrishna, 2012).

As far as law on discharge is concerned, it is seen in the Malaysian Bankruptcy Act 1967 which has provided for several mechanism for discharge i.e. discharge by annulment, by court and by certificate of Director General of Insolvency (DGI). Recently, in the effort towards modernizing the Malaysian bankruptcy law, the new Bankruptcy (Amendment) Bill 2016 (Bill 2016) was tabled on 21 November 2016 in the Malaysian Parliament for its First Reading. Among others the Bill introduces an automatic discharge. It is reported that a new provision allowing for an automatic discharge of the bankruptcy after three years upon submitting his statement of affairs and subject to achieving the target contribution set by the DGI and having rendered an account of monies and property to the DGI. The creditors can object to the automatic discharge but there are only limited specified grounds they can raise (Malaysian Lawyer, 2016). Unlike in E&W where the BRO is introduced for public protection in a response to misconduct by a bankrupt in connection with the bankruptcy, as well as to protect the public from culpable bankrupt, in Malaysia so far there is no such similar concept on restrictions except that it has been emphasized that after the bankrupts are discharged, any creditors who want to give financial assistance will be more cautious (Free Malaysia Today 2016). At least this is a right move of attitude towards a more responsible lending whereby the creditors or financial institutions should be able to conduct a search or study on their borrower's financial background and only offer loans or any credit facilities for those who are eligible and capable to repay their loan. In the commonwealth countries like England and Wales and Malaysia, the bankruptcy law have undergone considerable evolution. In England and Wales, beginning from the first 1542 Act to the EA 2002, the total period of evolution range over more than four hundred and sixty years, whereas for Malaysia, it was from the Bankruptcy Act 1967 till the current Bill 2016. Few of the features of bankruptcy law have emerged as follows: first, the interest of the creditors in maximizing their return in recovering their debt; secondly, the interest of the debtors in providing for their discharge and thirdly, the public interest in making sure that extended restrictions are placed and that culpable and

irresponsible debtors are duly punished. These important elements entered insolvency laws at different stages in its development, as for England and Wales, the first English 1542 Act or for Malaysia, the Bankruptcy Act 1967 only included the first element, while by the time the current EA 2002 came into force and Bill 2016 was tabled last year, all three elements could be seen in the Bill. Understandably, since the Bill 2016 is new for Malaysia, it remains to be seen the extent of which the law will protect public and lenders from culpable bankrupts as well as to allow them to differentiate between culpable and non-culpable bankrupts and make better-informed decisions in their dealings with them.

7. Conclusion

In order to effectively examine the roles and underpinning theories of personal insolvency or bankruptcy law, the competing theories of the insolvency process put forward by legal scholars were canvassed and discussed. While the legal literature advanced by CBT, BTC, RST and PT on the insolvency laws' role, as previously discussed, has advanced the 'concept of collectivity' that would eliminate 'first come, first serve' practice which is considered to be a 'race to collect among creditors,' it is criticized to be solely in favour of creditors and quite unsympathetic towards the rehabilitation of individuals debtors or bankrupts. It is important to note that the remainder of the theories i.e. VBT, DCT, ETD, IC&IHT and SUT recognize that the role of personal insolvency or bankruptcy law is not merely confined to maximizing returns to creditors, but to some other distributional role to play, for instance, to rehabilitate individual debtors in financial difficulty and to protect employment and public interests affected by the individuals being bankrupts. These views are consistent with the trend developing around the world that the personal insolvency or bankruptcy process should take on socio-economy and wider considerations than purely economic considerations. Bankruptcy law should not only act as a debts collections mechanism, but rather, it should also act as the mechanism to protect the right of the creditors against the debtor's wrongful act of not fulfilling his or her debts repayment. However, bankruptcy law is equally crucial in promoting rehabilitation to a debtor by way of discharge. Theoretically there are strong justifications to provide discharge mechanism to a bankrupt. A discharge will give a debtor a chance to have a fresh start in his or her life without thinking about the burden to pay the existing bankruptcy debts (Howell, 2014). A fresh start by way of discharge is considered as important in line with the objective of the bankruptcy law, which is generally to benefit debtors, creditors and a community as a whole (King, 2004). This can be seen in the origins of bankruptcy law in England and Wales which aimed solely to protect the creditor's right against the debtors although the recent development has shown that both the Insolvency Act 1986 and the Insolvency Rule 1986 have been substantially revised not only to protect the rights of the creditors but so as to promote a "rescue culture" or pre-rehabilitation schemes to the debtors. These include the procedures of Individual Voluntary Arrangement and Debts Relief Order (Shumaker, Loop & Kendrick, 2013). It appears that Malaysia is not lagging too far behind England and Wales as similarly the current Bill introduces pre-rehabilitation schemes to include Voluntary Arrangement, which aim to facilitate a fresh start to the debtor as well as strengthen repayment process to the creditors.

Acknowledgments

Fundamental Research Grant Research (FRGS) under Ministry of Higher Education of Malaysia funds this research.

References

- Ayotte, M.K. & Skeel, A. D. (2013). Bankruptcy law as a liquidity provider: University of Pennsylvania Law School Penn Law Volume 80 1557.
- Azalina: Bankruptcy law changes to reduce debtors' burden' <<http://www.freemalaysiatoday.com/category/nation/2016/10/28/azalina-bankruptcy-law-changes-to-reduce-debtors-burden/>> accessed 23 December 2016
- Baird, D.G & Jackson, T. (1984). Corporate reorganization and the treatment of diverse ownership interests: A comment on adequate protection of secured creditors in bankruptcy, 51 *U. Chi. L. Rev.* 97.
- Brunstad Jr, G.Eric (2014). The three faces of bankruptcy law, Yale law School Legal Repository. 7 <<http://digitalcommons.law.yale.edu/ylsd/7>>
- Cork Report: Report of the Review Committee, Insolvency Law and Practice (Cmnd 8558, 1982), Para. 495.
- Czarnetzky, M. J. (2000). The individual and failure: A theory of the bankruptcy discharge: Arizona State Law Journal 393
- Baylor Business Review. (2007). Ethics of bankruptcy. <<https://bbr.baylor.edu/bankruptcy/>>
- Fabian, R. A. (2013). Individual bankruptcy in the US: Lesson for Hungary: Central European University.
- Fletcher, I.F (2002). *The Law of insolvency* (3rd edn. Sweet & Maxwell)
- Flint, E. R. (1991). Bankruptcy policy: Toward a moral justification for financial rehabilitation of the consumer debtor, Volume 48, Issue 2: Washington & Lee Law Review.
- Fossen, F.M (2011). Personal bankruptcy law, wealth and entrepreneurship: Theory and evidence from the introduction of a 'Fresh Start' SOEP paper No. 358; DIW Berlin Discussion Paper No. 1100 <<http://dx.doi.org/10.2139/ssrn.1750282>>
- Goode, R.M (2008). *The principles of corporate insolvency law* (3rd edn. Sweet & Maxwell)
- Howell, N. (2014). The fresh start goal of the bankruptcy act: Giving a temporary reprieve or facilitating debtor rehabilitation? Volume 14, Number 3: QUT Law Review.
- Hynes, M.R. (2004). Why (consumer) bankruptcy? Faculty Publications, Paper 966: College of William & Mary Law School
- Insolvency Service, *Productivity and Enterprise Insolvency- A second Chance* (Cm 5234, 2001).
- Jackson, T. (2001). The logic and limits of bankruptcy law (Beardbooks, Washington)
- Jackson, T. and Scott, R (1989). 'On the nature of bankruptcy: An essay on bankruptcy sharing and the Creditors' Bargain' 75 *Virginia LR* 155 at 160.
- King, J. (2004). Moving beyond the 'hard'-'easy' tug of war: A historical, empirical and theoretical assessment of bankruptcy discharge, Volume 28, 679: Melbourne University Law Review.
- Korobkin, D.R. (1993). 'Contractarianism and the normative foundations of bankruptcy law' 71 *Texas L.Rev.* 541 at 555.
- Pheng, L.M & Detta, I. J. (2014). *Business law. Malaysia* (2nd edn. Oxford University).
- Levinthal, L.E. (1919). The early history of English bankruptcy, Vol.67: University of Pennsylvania Law Review & American Law Register.
- McConville, M. & Wing, H. (2007). Research methods for law, (Edinburgh, Edinburgh Universiti Press)
- McKenzie-Skene, D. & Walters, A. (2008). In consuming passions: Benchmarking consumer bankruptcy law systems. In Paul J Omar In *International Insolvency Law* (Ashgate Publishing Ltd, Surrey)
- Mokal, R.J. (2001). 'The authentic consent model: Contractarianism, creditors' bargain, and corporate liquidation' 21 *Legal Studies* pp. 401-404.
- Mooney, W.C. (2004). A normative theory of bankruptcy law: Bankruptcy as (is) civil procedure, Volume 61, Issue 3: Washington and Lee Law Review.
- Productivity and Enterprise Insolvency- A Second Chance, Cm 5234 (2001):

- Radakrishna, G. (2012). Winds of change in Malaysia's insolvency laws part 1: Bankruptcy 3 MLJ Clxvii Volume 3
- Rajak, H (2008). In The Culture Of Bankruptcy In Consuming Passions: Benchmarking Consumer Bankruptcy Law Systems In Paul J Omar In International Insolvency Law (Ashgate Publishing Ltd, Surrey)
- Shumaker, Loop & Kendrick (2013). Insolvency laws in Germany, U.K. and the U.S: A comparative law analysis for trade creditor's insolvency laws in Germany: Pinsent Masons.
- Sousa, D. M. (2010). The principle of consumer utility: A contemporary theory of the bankruptcy discharge, Volume 58. Page 584: Kansas Law Review.
- The New Bankruptcy Bill: The 10 Changes to Bankruptcy Law in Malaysia' <https://themalaysianlawyer.com/2016/11/22/the-new-bankruptcy-bill-malaysia/> accessed 23 December 2016
- Yongqing, R. (2011). A comparative study of the corporate bankruptcy reorganization law of the U.S. and China: University of Groningen.